DOCUMENT RESUME

ED 246 779 HE 017 502

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TITLE Developing Faculty Data Bases and Institutional Research Studies as Advanced Planning Mechanisms for Potential Litigation. AIR Annual 1984 Forum Paper.
PUB DATE May 84
NOTE 23p.; Paper presented at the Annual Forum of the Association for Institutional Research (24th, Fort Worth, TX, May 6-9, 1984).
PUB TYPE Reports - Research/Technical (143) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *College Faculty; *Court Litigation; Databases; *Employment Practices; *Faculty College Relationship; Higher Education; Information Needs; Institutional Research; *Personnel Policy; Research Needs; Tenure
IDENTIFIERS *AIR Forum

ABSTRACT

The types and number of faculty cases litigated and reported at state and federal levels for the 1982 calendar year are examined. Each case is reviewed for the basic facts, the underlying legal rationale, the data requirements, and the decision of the court. It is noted that categorical data summaries were developed of the cases and the associated data needs. From these data summaries, suggested institutional research databases and studies were formulated as advanced planning mechanisms for potential litigation or, possibly, litigation avoidance. Of 53 cases dealing with college faculty litigation that were located, 9 involved two-year institutions, 15 four-year; 29 had graduate and/or professional programs beyond the bachelor degree. Most of the cases were unsuccessfully brought to court by nontenured males at graduate-level institutions and, in most cases, the courts ruled in favor of the institutions. Nineteen of the plaintiffs were female, and 34 were male. The main points of litigation concerned nonrenewal, promotion denial, tenure denial, and termination. It is concluded that institutional researchers and administrations should design studies to periodically compare salaries, raises, promotion, and tenure achievement by sex, race, age, and organizational units. (Author/SW)

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Developing Faculty Data Bases and Institutional Research Studies as Advanced Planning Mechanisms for Potential Litigation

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THE ASSOCIATION FOR INSTITUTIONAL RESEARCH

This paper was presented at the Twenty-Fourth Annual Forum of the Association for Institutional Research held at the Hyatt-Regency in Fort Worth, Texas, May 6-9, 1984. This paper was reviewed by the AIR Forum Publications Committee and was judged to be of high quality and of interest to others concerned with the research of higher education. It has therefore been selected to be included in the ERIC Collection of Forum papers.

Daniel R. Coleman, Chairman
Forum Publication
Advisory Committee

Abstract

The purpose of this paper is to familiarize higher education administrators and support personnel with the types and number of faculty cases litigated and reported at state and federal levels for the 1982 calendar year. Each case was reviewed for the basic facts, the underlying legal rationale, the data requirements, and the decision of the court. Categories of cases and the associated data needs were developed. From these categorical data summaries, suggested institutional research data bases and studies were formulated as advanced planning mechanisms for potential litigation or, hopefully, litigation avoidance. This is an update of research partially reported at the 1983 A.I.R. Forum.

Developing Faculty Data Bases and Institutional Research Studies as Advanced Planning Mechanisms for Potential Litigation

Introduction

The purpose of this paper is to familiarize higher education administrators and support personnel with the types and the number of faculty cases litigated and reported at state and federal levels for the 1982 calendar year. Each case was reviewed for the basic facts, the underlying legal rationale, the data requirements, and the decision of the court. Cases were categorized by type of litigation, and each category was analyzed for data requirements. From this analysis, suggested data bases and institutional research studies were formulated as advanced planning mechanisms for potential litigation or, hopefully, litigation avoidance.

Regarding the American penchant for litigation, Lieberman (1981) comments:

> Ours is a law-drenched age. Because we are constantly inventing new and better ways of bumping into one another, we seek an orderly means of dulling the blows and repairing the damage. Of all the known methods of redressing grievances and settling disputes--pitched battle, rioting, dueling, mediating, flipping a coin, suing--only the latter has steadily won the day in these United States. Though litigation has not routed all other forms of fight, it is gaining public favor as the legitimate and most effective means of seeking and winning one's just deserts. So widespread is

> the impulse to sue that litigation has become the nation's secular religion, and a growing array of procedural rules and substantive provisions is daily gaining its adherents. These days one hears a crescendo of concern that America has become a litigious society, posing dangers to individuals and to the common weal. (p. 2)

As Lieberman (1981) concludes, this has certainly become the age of litigation, and academic institutions are no longer immune to this epidemic of suits. However, traditionally academia has been heavily insulated from judicial resolution of conflicts. Kaplan (1978) points out:

> The special higher education environment was also thought to support a special virtue and ability in its personnel. The faculties and administrators (often themselves respected scholars) had knowledge and training far beyond that of the general populace, and they were charged with the guardianship of knowledge for future generations. Theirs was a special mission pursued with special expertise--and often at a considerable financial sacrifice. The combination spawned the perception that ill-will and personal bias were strangers to academia and that outside monitoring of its affairs was therefore largely unnecessary. (p. 5)

The courts supported this viewpoint for many years with such legal doctrines as governmental and charitable immunity and a pervasive deference to the right of academic administrators to render judgements regarding appointment, promotion, and tenure virtually without challenge.

Within recent years, according to Kaplan (1978, pp. 8-9), this reluctance on the part of the judiciary to intrude into academic decision-

making has rapidly dissipated due to several factors. First, as enrollment increased during the past two decades, a larger number of faculty were hired to meet this demand. Newer faculty members were less reluctant and more able financially to question judgements of administrators than those faculty members who had been in the system for some time. The sheer fact of more faculty resulted in an increased number of collisions and questioned judgements. Second, with this expansion in the number of litigations came a growing advocacy for faculty rights bolstered by a broader interpretation by the courts of federal Constitutional provisions. Third, academia began to lose its administrative autonomy with the increase of state and federal educational support in the form of research grants, legislative appropriations, and scholarships and loan programs. Faculty litigation is now allowing the courts to render decisions on disputes involving contractual agreements, discrimination, due process, academic freedom, financial exigency, collective bargaining, and a host of additional topics.

As colleges and universities are drawn more frequently into the legal arena, chief administrators and support personnel must be acutely aware of the potential areas of litigation, must administer in a manner which minimizes this potential, and must prepare in advance a number of basic analyses upon which decisions can be made and legal defenses may be developed. As Simpson and Rosenthal (1982) caution:

> Many potential problems can be forestalled by alert administrators who are familiar with current federal regulations and how the courts have interpreted them, who have seen to it that adequate affirmative

action procedures are in effect and closely monitored, and that everyone has recourse to an internal grievance procedure. (pp. 3-4)

Purpose

The purpose of this study is to familiarize higher education administrators and support personnel with the types and number of faculty cases litigated at state and federal levels for the 1982 calendar year. During two previous AIR forums, several papers addressed the role of the institutional researcher in litigation, but none of these took an in-depth survey of all the types of faculty cases litigated and the data addressed by these cases. Only by understanding the full range of potential litigation areas can an administrator adequately plan and manage data analyses for possible suits. This paper will provide this overview and needed detail.

Literature Review

While many books and articles have been written addressing statistical techniques and discrimination litigation (Note 1), few articles address the role of the institutional researcher in legal defense procedures. This researcher found no books, articles, or presentations surveying the range of current faculty litigation from the perspective of the institutional researcher.

One article and three presentations were located which addressed the role of institutional researchers in court cases. Simpson and Rosenthal (1982) thoroughly discuss the establishment of a *prima facie* case in class action suits and preparation of a strong defense against such arguments.

Yancey (Note 2), in two presentations to the Twenty-Second Annual Forum of the Association for Institutional Research, discusses the role of an expert witness, choosing data bases and analyses, presenting rebuttal evidence, and establishing an "early warning system" for potential student litigation.

Parry (Note 3) presents a thorough discussion of the supporting role of the institutional researcher in class action employment discrimination lawsuits. In summarizing the responsibilities of the institutional researcher, Parry recommends that the researcher "establish and maintain basic knowledge of legal approach to discrimination" and "read cases dealing with use of statistics in discrimination suits." (p. 14)

As previously stated, no books, articles, or presentations which summarized and analyzed a recent year of faculty litigation from the viewpoint of the institutional researcher were located.

Methodology

Data Sources

The data for this study was derived from all court cases involving higher education faculty in which the decision was rendered in 1982 and was reported prior to October 1, 1983. Legal publications used to locate cases included West's General Digest and Education Law Reporter, Yearbook of Higher Education, NOLPE School Law Reporter, NOLPE Notes, Journal of Law and Education, and United States Law Week. Cases were not included if the plaintiff or appellant held no faculty rank or if the defendant or respondent was a system or an agency other than a higher education institution.

Data Elements

For each case the following data was analyzed where available: state, institution, institution level (two-year, four-year, or graduate), type control (state/local, or private), full time enrollment, faculty rank and tenure status, faculty sex, legal rationale, facts of the case, data requirements, and decision of the court. Institutional data was obtained from the Yearbook of Higher Education (1982) and from the Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education (1983).

Limitations

It must be recognized that the number of reported cases represents only a portion of the faculty grievances which are dealt with each year by institutions of higher education. Although many of these initial complaints never result in formal litigation, most grievances involve many hours of administrative review, data collection and analysis, and, in many cases, direct legal expense.

Also, many of the cases actually decided and reported for 1982 began three to ten years earlier as grievances on the local campus. Most have progressed through various hearings, motion decisions, trials, and appeals prior to the latest court ruling. Many of the parties involved will continue to pursue additional appeals beyond the latest decision. The group of cases analyzed for this study must be viewed only as a sampling of the total universe of higher education faculty litigation developing over the past decade.

Results

Using the above procedures, 53 cases dealing with higher education faculty litigation were located. The following discussion addresses the

characteristics of institutions, faculty, court decisions, points of litigation, and data needs by categories.

Institutions

Of the fifty-three faculty cases analyzed, nine (17%) were two-year institutions, fifteen (28%) were four-year institutions, and twenty-nine (55%) were institutions having graduate and/or professional programs beyond the bachelor degree. The cases were litigated in twenty-five states, primarily in the northern, mid-western, and Pacific coast states. California and Texas had the highest number of cases with six reported for each state. Only seven of the institutions involved had collective bargaining agreements with faculty.

All nine of the two-year institutions were state or locally controlled. This group of institutions had a mean full-time enrollment of 6,580 and a range of 808 to 29,000.

Ten of the four-year institutions were state facilities while five were private (two Southern Baptist, one Presbyterian, and two unaffiliated). The mean full-time enrollment of the state institutions was 4,522 with a range of 784 to 19,184. The private four-year institutions had a mean full-time enrollment of 2,426 with a range of 637 to 6,690.

The twenty-nine graduate-level institutions consisted of twenty-four state schools and five private (three Roman Catholic and two unaffiliated). The state institutions had a mean full-time enrollment of 10,663 with a range of 1,315 to 35,365. The private schools had a mean full-time enrollment of 4,745 ranging from 1,145 to 9,422.

Faculty

Sex. An analysis of the primary plaintiff in each case revealed that nineteen (36%) were female and thirty-four (64%) were male. Cases against

two-year institutions were originated by six females (67%) and three males (33%). Cases involving four-year colleges and universities were initiated by six females (40%) and nine males (60%). Lawsuits against four-year institutions with graduate programs were initiated by seven females (24%) and twenty-two males (76%).

Although a majority of cases were brought by males, an analysis by level of institution revealed that females initiated the majority of cases against junior or community colleges.

Tenure. The majority of cases, as might be expected, were brought by non-tenured faculty. Thirty-one (59%) non-tenured faculty initiated lawsuits with ten of these female and twenty-one male. Twenty-two (41%) were tenured and consisted of seven females and eleven males.

An analysis of tenure status by institutional level yielded results reflecting the overall distribution. Lawsuits involving two-year institutions were initiated by five non-tenured (55%) and four tenured (45%) plaintiffs. In each category, the majority of plaintiffs were female. The majority (53%) of plaintiffs in cases against four-year institutions were non-tenured. At this level, the non-tenured and tenured males outnumbered the females. Lawsuits against institutions with graduate programs were initiated primarily by non-tenured plaintiffs (62%), and males maintained the majority in both non-tenured and tenured categories.

Rank. The professional rank of each plaintiff was difficult to determine with four cases making no mention of a specific rank. In the other cases, it was unclear whether the judge was using the terms "instructor" and "professor" as exact ranks or as general terms for "faculty member." Despite this data

problem, it was concluded that most non-tenured plaintiffs were either instructors (31%) or assistant professors (45%) and that the majority of tenured plaintiffs were professors (40%).

Academic discipline. Although not all cases mentioned the academic disciplines of the plaintiffs, a brief comment on those available may be useful. At all institutional levels, the plaintiffs came from a wide array of departments, but primarily from arts and sciences. Plaintiffs from junior colleges evenly represented accounting, music, nursing, physical education, and secretarial sciences. At four-year institutions, three (21%) plaintiffs were from physical education with a variety of other disciplines represented. At graduate-level institutions, five (20%) were from medicine, three (12%) were from economics, and two (8%) each were from Afro-American studies, English, psychology, and social work.

Court Decisions

It is quite evident from the analysis of court decisions that the education institutions won the majority of cases or motions being considered. Of the fifty-three cases, thirty-eight (72%) of the decisions favored the institution while fifteen (28%) held for the faculty member. This distribution also remained fairly constant when decisions were analyzed by level of institution. Sixty percent of these successful faculty were non-tenured.

The courts ruled favorably for two-year institutions in six (67%) of nine cases. Four-year colleges and universities won favorable decisions in ten (67%) of fifteen cases, and graduate institutions received positive rulings in twenty-two (76%) of twenty-nine cases.

Litigation Points and Data Required

Although faculty members sued educational institutions for a variety of primary and secondary reasons, the principal points of litigation (as stated

by the plaintiff) were utilized to divide the cases into five major categories--non-renewal, promotion denial, tenure denial, termination, and miscellaneous. The following sections will summarize the policies and data introduced as evidence in the cases within each of these categories.

Non-renewal. Eight (15%) cases involved non-renewal of a faculty member's contract. Non-renewal cases were initiated against one junior college, three four-year institutions, and four graduate-level institutions. The plaintiff only won two of these cases.

Evidence for these cases included faculty handbooks; copies of faculty transcripts; faculty contracts; collective bargaining agreements; tenure regulations; procedures on grievances, faculty evaluations, and requisitions; and policies regarding leaves of absence, resignations, grading, presidential powers, and employment criteria. Data requirements included comparisons of numerical faculty evaluations, terms of appointment by rank and race, initial dates of appointment, average faculty salaries by rank, and the number of faculty funded by grant activities by department and college.

Promotion denial. Eight (15%) cases based the reason for litigation primarily on denial of promotion. Faculty members initiated this type of case against two junior colleges, three four-year institutions, and three graduate-level institutions. Only thirty-seven percent of these cases were won by the plaintiff.

Evidence for these cases included faculty contracts, job descriptions, search procedures, promotion criteria, faculty handbooks, faculty classification plans, merit guidelines, salary policies and affirmative action plans. Data requirements included faculty comparisons by rank, years in rank,

years at institution, tenure status, and highest degrees; number of females reviewed, promoted, and denied; average salaries by rank, sex, and race; promotions for the last five years by sex, department, rank, date hired, and promotion date; tenure grants using the same comparisons; workload comparisons; percent of female faculty, department heads and chief administrators; raise percentages for the last five years by rank, sex, and race; and the number of faculty receiving degrees from that institution and in-state institutions.

Tenure denial. Tenure denial was the largest category of cases (28%) in this study. Fifteen cases involved no junior colleges, five four-year institutions, and ten graduate-level institutions. The plaintiff won in only five (33%) cases.

Evidence for these cases included faculty handbooks, tenure policies, contracts, salary and evaluation criteria, college mission statements, institution policy manuals, faculty vitae, grievance procedures, financial audits, tenure files for the past eight years, initial letters of employment, and results of external evaluations of faculty publications. Data requirements included percent tenured by departments; projected enrollments; student/faculty ratios; faculty profile by salary, age, sex, race, rank, and tenure status; peer and student evaluation comparisons; use of research funds; percent time distribution by teaching and research; raise percentages for the previous six years by profile categories; workload comparisons; number of one-year contracts for the past ten years; weighting scales for publications; number of terminal degrees by departments; and the number of qualified females in the relevant labor pool.

Termination. Cases placed in this category involved tenured and non-tenured faculty whose contracts were terminated prior to the end of the employment period. Termination was the litigation basis for twelve (23%) cases against three junior colleges, three four-year institutions, and six graduate-level institutions. The plaintiff won in only three (25%) of these cases.

Evidence for these cases included faculty contracts, grievance procedures, financial exigency guidelines, alcohol and drug policies, sexual harassment policies, and faculty handbooks. Data requirements included faculty workload comparisons; number of faculty by departments; "soft" positions by time-in-rank; class schedules; distribution of CETA funds; number of inter-institutional appointments; enrollment projections; number of vacancies filled by race and sex for the previous five years; and faculty absences during the first ten days of each new quarter.

Miscellaneous. Ten (19%) cases were categorized as miscellaneous and included litigation addressing reassignment, forced retirement, classification, parking citations, salary increases, and external employment. Three junior colleges, one four-year institution, and six graduate-level institutions were defendants in these litigations. Faculty were successful in only three (30%) lawsuits.

Evidence for these cases included collective bargaining agreements, internal memoranda, grievance procedures, faculty classification procedures, faculty handbooks, parking regulations, retirement policies, policies on concurrent full-time employment, and faculty contracts. Data requirements included number of hours of outside employment; number of faculty dismissed during the previous ten years due to violation of outside employment regulations; number of times chancellor's dismissal recommendation had been

overruled by the board; total financial status of the institution; number of temporary faculty by departments; workload comparisons; coaches' duties; administrative salary supplements, secretarial assistance, and payments for travel and professional dues available to tenured faculty under forty years of age; average payroll deductions; traffic fine comparisons by violation for faculty and staff; and age distribution of tenured faculty.

Conclusions

Higher education administrators and institutional researchers should do everything reasonably possible to avoid litigation prompted by faculty disagreements or concerns. An effective administrator should be sure that policies, procedures, and manuals are updated and comprehensive. It is extremely important that such items as faculty handbooks, contract forms, grievance procedures, evaluation criteria, financial exigency plans, affirmative action and sexual harassment policies, and tenure and promotion policies be in place, current, and periodically reviewed by administrators and an attorney.

It is evident from a thorough review of 1982 faculty litigation reported to date that a current and extensive faculty data base is essential for avoiding or successfully surviving litigation. Initial employment data, salary and promotion histories, and workload data are important components which should be carefully monitored. A responsible institutional researcher, in concert with appropriate administrators, will design studies to periodically compare salaries, raises, promotion, and tenure achievement by sex, race, age, and organizational units and will keep administrators informed of potential trouble spots.

Summary

Broad generalizations are always dangerous burdens with which researchers should avoid being encumbered. From the review and analysis of 1982 litigation, one could conclude that most law suits are unsuccessfully brought to trial by non-tenured male assistant professors of medicine in public graduate-level universities. Of course, this would be an overly broad assumption and a flagrant misuse of statistics. From the 1982 cases reported to date, one can safely conclude that most cases were brought to court by non-tenured males at graduate-level institutions and that the courts held for the institutions in a majority of these cases.

Colleges and universities cannot avoid faculty lawsuits but should make every effort to minimize litigation by careful periodic review of faculty data, policies, and procedures. Institutional researchers can be a vital, integral component of this process.

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